BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CONNIE BRADLEY,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent.

LUBA No. 2002-124

FINAL OPINION
AND ORDER

Appeal from Washington County.

William C. Cox and Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of petitioners.

Alan R. Rappleyea, Senior Assistant County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 02/20/2003

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision that (1) denies petitioner's request for approval of a replacement dwelling in an exclusive farm use (EFU) zone, and (2) determines that petitioner does not have a nonconforming use right to replace an existing dwelling.

INTRODUCTION

The dwelling that is at issue in this appeal is located on a one-acre parcel zoned EFU. The dwelling was built in 1940, before the county first adopted zoning for the subject property. Petitioner wishes to remove that dwelling and replace it with a new dwelling. There are two statutory provisions that potentially allow petitioner to do so. The first provision is ORS 215.213(1)(t), which authorizes alteration, restoration or replacement of a lawfully established dwelling (hereafter replacement dwelling) as a permitted use if specified statutory requirements are met.[1] The second provision is ORS 215.130(5), which allows

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[1] Under *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), the uses listed under ORS 215.213(1) are considered outright permitted uses that counties may not subject to additional local regulations. ORS 215.213(1) sets out the following as one of these permitted uses:

> "(t) Alteration, restoration or replacement of a lawfully established dwelling that:
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> > "(A) Has intact exterior walls and roof structure;
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> > "(B) Has indoor plumbing consisting of a kitchen sink, toilet and bathing facilities connected to a sanitary waste disposal system;
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> > "(C) Has interior wiring for interior lights;
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> > "(D) Has a heating system; and
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> > "(E) In the case of replacement, is removed, demolished or converted to an allowable nonresidential use within three months of the completion of the replacement dwelling. * * *"

The statutory language at ORS 215.213(1)(t) (A) through (E) is replicated at Washington County Community Development Code (CDC) 430-8.2. Although the challenged decision generally refers to CDC 430-8.2, we generally refer to the statute in this opinion.

nonconforming uses to be continued and altered.[2] The hearings officer found that petitioner could not be granted approval for a replacement dwelling under ORS 215.213(1)(t), because the dwelling lacked the "intact exterior walls and roof structure" that are required by ORS 215.213(1)(t)(A). The hearings officer found that petitioner's request could not be granted under ORS 215.130(5), because residential use of the dwelling was "abandoned or discontinued" for more than one year prior to 1995.[3] This appeal followed.

FIRST ASSIGNMENT OF ERROR

Although the parties put somewhat different spins on the evidence, there is no serious dispute that the dwelling at issue in this appeal is seriously dilapidated. It has not been occupied since the fall of 1995, at the latest. Petitioner argues that much of the damage to the structure occurred while it sat empty during continuous but unsuccessful attempts to sell the property since 1995. The dwelling will likely fall of its own weight if it is not repaired or removed in the near future. The hearings officer's findings accurately describe the current condition of the dwelling:

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[2] ORS 215.130(5) provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject [ORS 215.130(9)]. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted."

[3] Although ORS 215.130(5) grants a limited right to continue a use that no longer complies with applicable land use regulations, ORS 215.130(7)(a) provides that that limited right is extinguished if the use is interrupted or abandoned.

> "Any use described in [ORS 215.130(5)] may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption."

County legislation imposes a similar limitation. *See* n 10.

> "* * * The photos provided by the applicant include photos of the front, or eastern side of the structure. These pictures show a dilapidated structure with a roof over the porch area and a room. The roof over this room has several holes. Staff took pictures that show an attached garage dominates the northern elevation of the structure and that the northern wall of the garage is leaning toward the structure approximately 15 degrees and that the roof on the garage has a significant sag in it. Staff's pictures show that on the southwest side the attached * * * garage structure is pulling away from the rest of the structure and there is a six-inch gap between the garage roof structure and the wall. *Staff's pictures show that the western elevation of the structure has one opening, a sliding glass door. These pictures show that the wall has separated from the south side of the door and that there is a gap at the bottom of the door between the wall and the door of approximately two feet. The wall and the door are only connected at the top of the door. On the north side of the door there is a hole in the wall approximately three feet wide and two feet tall. Additionally, the door has sagged, dropping away from the roof by approximately two feet at its widest point. This separation of the roof and wall spans approximately half of the structure.* The pictures show that the south elevation of the building has three windows. The [easternmost] window along the southern elevation is missing. The southern elevation shows signs that the western third of the structure is separating from the rest of the structure adjacent to the old electrical service for the structure. The western third of the structure has separated from the rest of the structure by 10 to 12 inches. One picture shows light shining through the hole in the roof because the roof has separated in this area.
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> "* * * Staff concluded based on its inspection of the property and the pictures that the [requirement for intact exterior walls and roof structure] had not been met, because the roof on the eastern elevation was not intact, that at least two of the walls and the roof of the attached garage were not intact, that *the wall on the western elevation was not intact*, and that the wall and roof on the southern wall was not intact. The Hearings Officer concurs with these findings. * * * Record 9-10 (footnotes omitted; emphases added).

The focus of petitioner's first assignment of error is the planning staff's interpretation and application of ORS 215.213(1)(t), which the hearings officer agreed with. In particular, petitioner argues that planning staff erroneously interpreted the requirement of ORS 215.213(1)(t) for "intact exterior walls and roof" to require that the exterior walls and roof be in a flawless or "unimpaired condition." Petition for Review 9. The planning staff report to the hearings officer includes the following discussion of the "intact exterior walls and roof structure" criterion:

> "The applicant argues that Staff is taking the [replacement dwelling standards] to an extreme by requiring that there be no blemishes on a structure for it to be replaced pursuant to [those standards]. Staff disagrees that we employed an extreme interpretation. Staff believes that ORS 215.213(1)(t)(A) [and the CDC] are very specific in their terminology when they state that the structure shall have 'intact exterior walls and roof structure.' Webster's Third New [International] Dictionary defines intact as 'untouched esp. by anything that harms or diminishe[s]: left complete or entire.'[4]
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> "Staff believes that there is no leeway in this wording; the entire structure must be intact. The applicant uses the example that in using Staff's interpretation, if a tree falls on a house and punches a hole in the roof, then the dwelling could not be repaired pursuant to [ORS 215.213(1)(t)]. Staff agrees with the applicant that this interpretation means that a house, which has been damaged as a result of a tree falling on the structure cannot be repaired or replaced pursuant to the standards of [ORS 215.213(1)(t)]. This does not mean however that the structure cannot be repaired and continue to function as a dwelling. It simply means that the applicant must obtain approval for the repair pursuant to [the nonconforming use provisions of ORS 215.130(6)]."[5] Record 28 (emphasis omitted).

The above discussion in the staff report can be read to select the most limiting of the various meanings of "intact" listed in the dictionary.[6] Selecting the most limited meaning is arguably consistent with the approach the Court of Appeals generally takes in interpreting the scope of ambiguous statutes authorizing nonfarm uses in EFU zones. *McCaw*

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[4] Webster's Third New Int'l Dictionary, 1173 (unabridged ed 1981) includes the following definition of "intact:"

> "**1:** untouched esp. by anything that harms or diminishes**:** left complete or entire**:** UNINJURED <obtain your uncle's estate [intact] * * *> <houses largely [intact] after some 3500 years * * *> < the memory of that night remained [intact]> **2:** *of a living body or its parts***:** physically and functionally complete**:** having no relevant component removed or destroyed * * *."

[5] ORS 215.130(6) provides:

> "Restoration or replacement of any use described in [ORS 215.130(5)] may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster. * * *"

[6] This case presents no question concerning how or whether ORS 215.213(1)(t) would apply to a house that is damaged by a falling tree, and we do not consider that question.

Communications, Inc. v. Marion County, 96 Or App 552, 555, 773 P2d 779 (1989); *Hopper v. Clackamas County*, 87 Or App 167, 172, 741 P2d 921 (1987), *rev den* 304 Or 680, 748 P2d 142 (1988). However, as petitioner correctly argues, selecting the most limited interpretation of "intact" effectively requires that one ignore the context in which that term appears. Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), statutory terms must be viewed in context.

The parties cite legislative history that makes it clear that ORS 215.213(1)(t) was adopted as an alternative to the much more limited rights that a property owner enjoys under ORS 215.130(5) to continue and alter a nonconforming use. The right that the legislature granted under ORS 215.213(1) is a right to "alter[], restor[e] or replace[] a lawfully established dwelling * * *." We do not believe the legislature intended to limit that right to alter, restore or replace a dwelling to dwellings that are unblemished or unimpaired. In particular, we do not believe that the legislature intended to only allow restoration of dwellings that are in perfect condition and therefore do not need restoration.[7] Such an interpretation of "intact" ignores the statutory context in which the word appears. To the extent the decision can be read to embrace that interpretation, we agree with petitioner that it is erroneous.

Our rejection of staff's apparently extreme understanding of what is required for "intact exterior walls and roof structure" of course begs the question of what the statute does mean. Petitioner never clearly articulates her view of the meaning of "intact exterior walls and roof structure." However, given the condition of the dwellings walls and roof structure, we understand petitioner to contend that as long as the walls are still standing, no matter how

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[7] Webster's Third New Int'l Dictionary, 1936 (unabridged ed 1981) includes the following definition of restoration:

> "a bringing back to or putting back into a former position or condition * * * a putting back into an unimpaired or much improved condition * * *."

severely they are deteriorated, and as long as the roof has not completely collapsed, no matter how deteriorated the roof may be, the walls and roof are "intact" within the meaning of ORS 215.213(1)(t). That interpretation is every bit as extreme as staff's interpretation and essentially reads the word "intact" out of the statute. We reject petitioner's interpretation as well. If the legislature had intended such a permissive test, it would not have used the word "intact." The meanings set out in the dictionary definition of "intact" range all the way from "untouched" to "having no relevant component removed or destroyed." *See* n 4. However, reading that term in its statutory context, we conclude the legislature likely envisioned something short of those extreme meanings. One of the other meanings set out in the dictionary definition is "functionally complete." That meaning is more subjective than either petitioner's interpretation or staff's interpretation. However, it gives "intact" a meaning that also gives reasonable meaning to the "alteration, restoration and replacement" rights that ORS 215.213(1)(t) grants.

We believe the legislature intended the requirement for "intact exterior walls and roof structure" to require that the dwelling have functional walls and a functional roof structure. A wall and roof retain their functionality despite normal wear and tear and despite some damage. But at some point, a wall that is still standing is no longer a functional exterior wall because it no longer performs the function of separating an indoor living environment from the elements outside the dwelling. The exterior wall on the west side of the dwelling is not a functional exterior wall. While the planning staff and hearings officer may have applied an improperly high standard to other parts of the roof structure and other walls, their conclusion that the western exterior wall is not "intact" is clearly correct and supported by the record.[8] We understand the statute to require that all exterior walls must be intact. Because the

[8] The emphasized portion of the hearings officer's decision set out earlier in this opinion discusses the western wall. The record includes several pictures of that wall. Any possible argument that the west wall is a functional exterior wall is laid to rest by photographs in the record. Record 286 and 288-289 and color print labeled F-5.

county correctly found that at least one exterior wall is not intact, it correctly concluded that petitioner is not entitled to replace the existing dwelling under ORS 215.213(1)(t).

Petitioner argues that the existing western exterior wall should not be considered under ORS 215.213(1)(t). Petitioner contends that the western part of the dwelling is a poorly constructed addition to the original 1940 dwelling that was constructed some time after 1940.[9] This western addition apparently has settled so that it is no longer aligned with the original structure because it was constructed without a foundation. However, ORS 215.213(1)(t)(A) is not ambiguous in this regard. It requires that "exterior walls" be "intact." The wall that separates the living space that is contained in the western addition from the outside elements is the current western exterior wall. That is the wall that must be intact under ORS 215.213(1)(t)(A). As we have already explained, it is no longer a functional wall. For that reason it is not an "intact exterior wall" within the meaning of ORS 215.213(1)(t)(A).

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

As noted earlier in this opinion, the hearings officer found "that the structure was abandoned or discontinued for more than one year by June 20, 1995." Record 13. Because the hearings officer concluded that residential use of the structure was interrupted for more than one year before 1995, it was not necessary for the hearings officer to consider whether the owner's efforts to sell the property since 1995 would be sufficient to continue residential use of the dwelling without interruptions exceeding one year during the years following

[9] Over the years there have been a number of additions to the original dwelling: (1) a garage to the north side of the dwelling, (2) a front bedroom and porch to the east side of the dwelling and (3) a toilet and laundry room addition on the west side of the dwelling. Record 27. The original western exterior wall when the dwelling was constructed in 1940 is now an interior wall that is enclosed by the toilet and laundry room addition. Petitioner is correct that the additions appear to be the most dilapidated parts of the disputed dwelling.

1995. CDC 440-4.[10] The relevant findings addressing the time period prior to the end of 1995 are set out below:

> "The Applicant contends the structure is an existing nonconforming use. In support of this position the Applicant cites an affidavit from the owners of the property dated July 10, 2002 that 'to my knowledge' the last time the house was occupied was by renters in the fall of 1995. The owners go on to state in the Affidavit that because of the negative experience with the renters the owners decided to sell the house and began marketing efforts. There is also a letter from [petitioner] dated October 22, 1998 that states the owners' daughter occupied the home until November of 1995 and that she moved out to allow her parents to sell it. * * * The record [includes] two letters of comments received during the public comment period. One letter from Mr. Paul Simpson, who also testified at the Hearing, stated that the structure has not been occupied as a dwelling for at least 11 years. The other letter stated the property had not been occupied any time after 1990. The records of the Washington County Department of Assessment and Taxation state that an appraisal of the property on June 20, 1995 determined that the property was abandoned. *The Applicant submitted a number of pictures into the record taken in the fall of 1995. These pictures show no sign that the structure was inhabited at the time they were taken. No dishes are in the sink or cabinets. No furniture or personal effect are in evidence. The toilet in the 1995 pictures does not appear usable since it is sitting on the end of a sanitary pipe about one foot off of the ground. These photos contradict the testimony that the dwelling was occupied in 1995 when the photos were taken. These photos support the testimony that the structure had not been occupied since 1991 or before. These photos support the determination of the Washington County Department of Assessment and Taxation * * * that the property was abandoned. This evidence is also consistent with the Staff's recollection of a conversation in 1996 with the Applicant, in which she indicated that * * * she did not believe the structure had been occupied since 1990.* In the Hearings Officer's judgment the evidence supports the conclusion that the structure was abandoned or discontinued for more than one year by June 20, 1995. Record 11-13 (footnotes omitted; emphasis added).

The letter from the property owners and petitioner's letter appear at Record 124 and 139. These letters could reasonably have led the hearings officer to conclude that residential

[10] ORS 215.130(7)(a), quoted earlier at n 3, simply provides that a nonconforming use "may not be resumed after a period of interruption or abandonment," without specifying how long that period of interruption or abandonment must be. ORS 215.130(10) authorizes the county to "adopt standards and procedures to implement the provisions of [ORS 215.130]." CDC 440-4 provides that "[i]f a nonconforming use of land or structures is discontinued or abandoned for more than one (1) year for any reason except bona fide efforts to market the property or structure, it shall not be resumed unless the returned use conforms with the applicable requirements of [the CDC] at the time of proposed resumption. * * *"

use of the disputed structure was *not interrupted* for more than one year before 1995.[11] On the other hand, other evidence cited by the hearings officer could also reasonably lead the hearings officer to reach the *opposite conclusion*, as he did.[12] Petitioner challenges the motives of the neighbors who wrote letters in opposition to the proposal, disputes the evidentiary value of the general appraisal information sheet and the staff's explanation of that sheet, and argues that petitioner never met with planning staff in 1996 and never made the statement about pre-1995 vacancy that the planning staff report claims. However, viewed as a whole, that evidence is evidence a reasonable person could rely on to reach the conclusion that the hearings officer reached in this case. Given our conclusion that the hearings officer could reasonably have reached opposite conclusions about whether residential use of the dwelling was interrupted for more than one year before 1995, based on the evidence noted in this paragraph, the photographs noted in the decision assume added significance.

Part of the confusion about when the photographs were taken is properly attributed to the petitioner. Some statements made by petitioner can be read to suggest that the photographs in the record are from 1995. Petitioner apparently attached 1995 photographs to a prior application in this matter that was submitted in 1998, but for some reason those photographs were not placed before the hearings officer and are not in the record in this appeal. Petitioner argues that all of the photographs in the record in this appeal were taken

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[11] The letter from the property owners refers to "renters," which would suggest someone other than the property owners' daughter occupied the dwelling in 1995. Petitioner's letter claims the property owners' daughter occupied the dwelling in 1995. However, notwithstanding that possible inconsistency in the two letters, it would not have been unreasonable for the hearings officer to rely on these letters to conclude that residential use of the dwelling was not interrupted for a year or more before 1995.

[12] That evidence includes: (1) an April 26, 2002 letter from a neighbor in which he states "I have never seen anyone occupy the house * * * in the 11 years I have lived here," Record 210; (2) an April 26, 2002 letter from another neighbor in which he states the dwelling "has not been occupied since the late 1980's and certainly not anytime after 1990," Record 211; (3) a general appraisal information sheet that includes a remark that the house is abandoned, Record 112; (4) planning staff's explanation of that remark, Record 30; and (5) a planning staff report that states that petitioner indicated in a 1996 meeting "that no one had lived in the structure since 1990." Record 168.

after the dwelling was vacated in 1995 and after the dwelling suffered significant deterioration while it sat empty. Assessing the magnitude of the hearings officer's error in assuming the photographs referenced in the decision were taken in 1995 is complicated because for the most part the hearings officer does not clearly identify the photographs he relies on in the decision.

Petitioner argues that she pointed out to the hearings officer that the photographs in the record that show the interior and exterior condition of the dwelling were not taken in 1995. Record 17.[13] Petitioner contends that it was error for the hearings officer to rely in part on those photographs to conclude that residential use of the dwelling was interrupted for more than one year before 1995. Petitioner also argues that after petitioner called this issue concerning the date of the photographs to the hearings officer's attention, the hearing officer was obligated to respond to that issue in his findings. *City of Wood Village v. Portland Metro. Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *McConnell v. City of West Linn*, 17 Or LUBA 502, 519 (1989).

The county argues that given the other evidence cited by the hearings officer, even if the hearings officer erroneously believed the photographs were taken in 1995, his decision is supported by substantial evidence. We do not agree. The evidence that bears directly on the question of pre-1995 interruption of residential use of the property is hardly overwhelming. The letters constitute inconsistent remembrances of past events, none of which carry any particular independent indicia of reliability. The reliability of the assessor's sheet and the planning staff report, as evidence of pre-1995 interruption of residential use, is also debatable. Contrary to the county's suggestion, the hearings officer seems to have relied significantly on recent photographs, which he mistakenly believed were taken in 1995, to

[13] Petitioner's July 30, 2002 letter could have been clearer on this point. However the letter does specifically refer to the picture of the toilet that is cited in the hearings officer's decision. That picture was taken in 2002. The letter also takes the position that the pictures from 1995 showed "people in the structure." Record 17. None of the photographs in the record show people in the structure.

corroborate the evidence he ultimately relied on. He also appears to have relied in some measure on those same photographs in electing not to rely on the representations in the letters from petitioner and the property owners. We cannot tell from the decision and the record whether he would have decided the question about pre-1995 interruption of residential use in the same way if he had recognized that the photographs were recent photographs rather than photographs that were taken in 1995. A remand is necessary for the hearings officer to decide that question with a correct understanding of the dates those photographs were taken.[14]

The second and third assignments of error are sustained.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Petitioner submitted evidence to document that continuous efforts have been made to sell the disputed dwelling since 1995. Under the fourth assignment of error, petitioner argues this evidence is sufficient to establish that the dwelling was not abandoned or discontinued under CDC 440-4 after 1995. *See* n 10. Because the challenged decision does not consider that question, and the decision is not based on post-1995 interruption of the use, petitioner's arguments under the fourth assignment of error provide no basis for reversal or remand.[15]

Under the fifth assignment of error, petitioner argues that the hearings officer incorrectly found that the property owners abandoned residential use of the subject property

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[14] It is not disputed that many if not all of the photographs in the record were taken within the last two years. Others are not dated, but appear to be consistent with what the recent photographs show, suggesting that they too are recent photographs rather than photographs from 1995. We do not mean to suggest the hearings officer must disregard recent photographs in determining whether there was a pre-1995 interruption of residential use of the property. However, recent photographs obviously are much less relevant in making that determination than 1995 photographs would be.

[15] If the hearings officer decides the pre-1995 interruption question in petitioner's favor on remand, then the question of post-1995 efforts to sell the property will be relevant to determine if the use was interrupted or discontinued after 1995. In that event the hearings officer presumably will consider petitioner's arguments concerning those efforts to sell the property and determine whether they suffice to establish continued use of the dwelling under CDC 440-4.

prior to 1995. As petitioner correctly notes, abandonment requires "proof of an intent to relinquish a known right." *Tigard Sand and Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 134, *aff'd* 149 Or App 417, 943 P2d 1106, *adhered to* 151 Or App 16, 949 P2d 1225 (1997). Petitioner argues there is no such proof in this case.

The hearings officer concluded "that the structure was abandoned *or discontinued* for more than one year by June 20, 1995." Record 13. Petitioner does not argue that "discontinuance," or its statutory synonym "interruption," require "proof of an intent to relinquish a known right." We have held that in determining whether a nonconforming use has been "discontinued," proof of intent to relinquish the right to continue the nonconforming use is not required. *Sabin v. Clackamas County*, 20 Or LUBA 23, 31 (1990). In view of the hearings officer's alternative finding, petitioner's fifth assignment of error provides no additional basis for reversal or remand.

The county's decision is remanded.